

# STATE OF NEVADA

Department of Conservation & Natural Resources

DIVISION OF ENVIRONMENTAL PROTECTION

*Jim Gibbons, Governor*

*Allen Biaggi, Director*

*Leo M. Drozdoff, P.E., Administrator*

May 16, 2008

The Honorable Henry A. Waxman  
Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, D.C. 20515-6143

Dear Chairman Waxman,

We read with great interest your letter to Stephen Johnson, dated April 4, 2008, and the subsequent press coverage. As the environmental regulatory agency in Nevada, we have had similar concerns over the past several years as EPA continues to adopt flawed programs that have been overturned by the courts. In requesting information from EPA on the extent and effects of the agency's losses in federal court, we ask that you consider multiplying that number by at least 100 to include the costs incurred by all of the state and local regulatory agencies that have been required to adopt these new federal regulations and develop state implementation plans as required under the various acts. In addition to the money, time and other resources devoted to programs that have eventually been scrapped, many of the states and local governments and various multi-state environmental organizations have also spent an inordinate amount of time and money to sue EPA over regulations and programs that clearly had no basis in federal law. Most troubling to us is the fact that all of this was occurring during a period of funding decreases, increased costs and tightening budgets – a period when states and local agencies, as the agencies responsible for implementing environmental programs, could have been spending those resources addressing real environmental issues.

For example, the Nevada Division of Environmental Protection (NDEP) spent two and a half years and thousands of man hours developing a program to address mercury emissions from electric generating facilities – a program specifically designed to comply with the federal clean air mercury rule (CAMR). As the CAMR provisions clearly allowed, Nevada developed a program that provided additional mercury reductions from facilities within our state. The development of this program required the NDEP to seek changes to the Nevada statutes, develop and adopt new regulations, and develop and submit a State Plan -- all within the timelines specified by the federal regulations and the Clean Air Act. We worked very closely with our legislature, environmental groups and the regulated industry to develop a comprehensive and more stringent program only to have it become moot as a result of the court's decision to over turn EPA's regulations.



Not only did we incur significant costs related to developing our version of the CAMR program, we were also gearing up for a much longer fight. As we were preparing to submit our program, EPA made it clear that they did not like our allocation methodology and would not approve our program, despite repeatedly telling Congress and the courts that the rule provided the states with exactly that flexibility. Had the court not overturned EPA's CAMR, EPA would have disapproved our Plan. We would have been forced to sue EPA over this issue and were preparing to do so. We are now in the process of rewriting our regulations to delete the CAMR provisions and establish a state-only program. Meanwhile, mercury is continuing to be emitted without the benefit of an effective mercury reduction program. So, not only did we lose two and a half years of our time, by the time we are able to finalize our new regulations and get them implemented, it will have taken twice as long to begin seeing any public health and environmental results.

State and local agencies experienced similar resource impacts from EPA's changes to the New Source Review program for major stationary sources of air pollution. These changes included provisions that addressed clean unit exemptions, pollution control projects and routine maintenance, repair and replacement. As a delegated program we were under a very short time frame to adopt and implement these changes or face losing our program delegation. Again, significant time and resources were spent to understand what EPA was proposing and how it would work, develop and adopt new state regulations and draft a plan to submit to EPA. These federal regulations were also overturned by the court and required us to undergo yet another round of revisions to our state regulations. As you know, EPA has a number of additional NSR reforms in the queue.

The air program is not the only one affected. Under the water program, EPA adopted the Confined Animal Feeding Operations (CAFO) rule which required animal producers with the "potential" to discharge to apply for and receive a National Pollutant Discharge Elimination System (NPDES) permit. NDEP worked for almost 2 years to develop regulations with great resistance from our agricultural community and constant pressure from EPA to meet the adoption deadline. EPA's CAFO rule was overturned in the *Waterkeeper Alliance v. EPA* decision where the court determined a permit was needed only for those facilities that actually discharge.

By our count, EPA has lost at least seven major environmental cases before the courts and there are a number of other cases pending such as the soon to be released NPDES "permit fee incentive rule," which we understand EPA has forwarded to the Office of Management and Budget for final approval. Again, EPA is ignoring overwhelming state opposition, congressional input and, most importantly, the law. We intend to file suit against EPA as soon as this rule becomes final. Lawsuits are an incredible resource drain, but, unfortunately, it has become our only option in some cases.



Not only have these overturned rules delayed environmental protection and wasted resources, they have impacted EPA's ability to provide the states and local governments with a number of guidance documents, finalized rulemakings and approved State Implementation Plans (SIPs) needed to implement current federal programs, including implementation guidance for new PM<sub>2.5</sub> and ozone standards and the PM<sub>2.5</sub> increment rule -- documents and actions we should have had years, and in some cases, more than a decade ago.

We are a small program with limited resources. In the past, we have been able to rely on EPA for direction, but it has been clear to us for a number of years that this is no longer the case. We do not appear to have the same goals and, in fact, their efforts are undermining our ability to adequately and effectively protect public health and the environment. Over the past few years the Environmental Council of States (ECOS) has gathered and annually updated information that compares EPA and state budgets (unadjusted for inflation), for each year since 1997 (Table 1) and then compared those numbers to the number of new rulemakings that the states are required to adopt and implement (Figure 1). As you can see, the workload continues to increase. State funding is declining, yet EPA's funding increased through 2006 and then has remained steady. In order to keep pace with the demands placed on our air program, we have had to significantly increase our state revenue while at the same time watching our federal funds decline. In fact, EPA currently funds only about 10% of our air program.

In April of 2006, as our program's viability continued to be threatened by cuts to state and local grants and the increased burden imposed by unfunded, and, in many cases, eventually reversed, mandates, we wrote a letter to EPA Administrator Stephen Johnson expressing our concerns and our need to work on state, rather than federal, priorities. A copy of that letter is attached; however, we never received the courtesy of a response.

Not only is federal grant funding to the states decreasing, EPA is cutting funding to programs that states recognize as critical and limiting the ability of state and local governments to use state grant funds as we see fit. For example, in the air program, EPA, through the President's budget, proposed to cut the funding to Regional Planning Organizations in FY08 and eliminate that funding in FY09. On the water side, 106 funding is provided to address State water quality priorities pursuant to the Clean Water Act. However, EPA is directing this funding in the form of set-asides for agency specific priorities. These EPA priorities, such as probabilistic monitoring, have shown minimal benefits to the States, and States are not supportive of utilizing federal funds intended for core water programs to implement EPA projects.

Adding to the resource drain, and perhaps an even more important concern, is the impact that these misinterpretations and subsequent lawsuits have had on our relationship with EPA. These court rulings have damaged EPA's credibility. Because we can no longer rely on EPA's legal interpretations, we are now spending an unprecedented amount of time and legal resources reviewing and questioning their decisions, interpretations and motives, doing our own evaluation and when we disagree, resorting to legal action. For a

State with a small program and limited legal resources, this impact is huge. In addition, the current atmosphere of mistrust and conflict is having, and has had, a corrosive effect on our working relationship. In the past, we have had a more productive and collaborative working relationship with EPA and hope to do so again, but it will take years to rebuild trust and restore our relationship to anything remotely resembling a "partnership."

We recognize that federal funding is limited and are not asking you to consider increases. Rather, we would like to see the available funding be used more effectively to ensure that any new federal programs mandating state action are legally defensible, address real environmental issues and provide the state and local agencies with the flexibility they need to identify and address their specific priorities.

We appreciate your efforts to identify and quantify the impact of EPA's failed rulemaking attempts. Every time we are forced to develop programs that are clearly in conflict with the federal environmental law, it is an opportunity wasted and environmental protection delayed. The resource implications to a small state like ours and the negative effect on our relationship with EPA are enormous. These impacts will be felt for years to come.

We would be happy to provide you or your committee with more detailed information if you feel that it would be useful.

Sincerely,

A handwritten signature in dark ink, appearing to read "Leo M. Drozdoff". The signature is fluid and cursive, with the first name "Leo" being particularly prominent.

Leo M. Drozdoff, P.E.  
Administrator

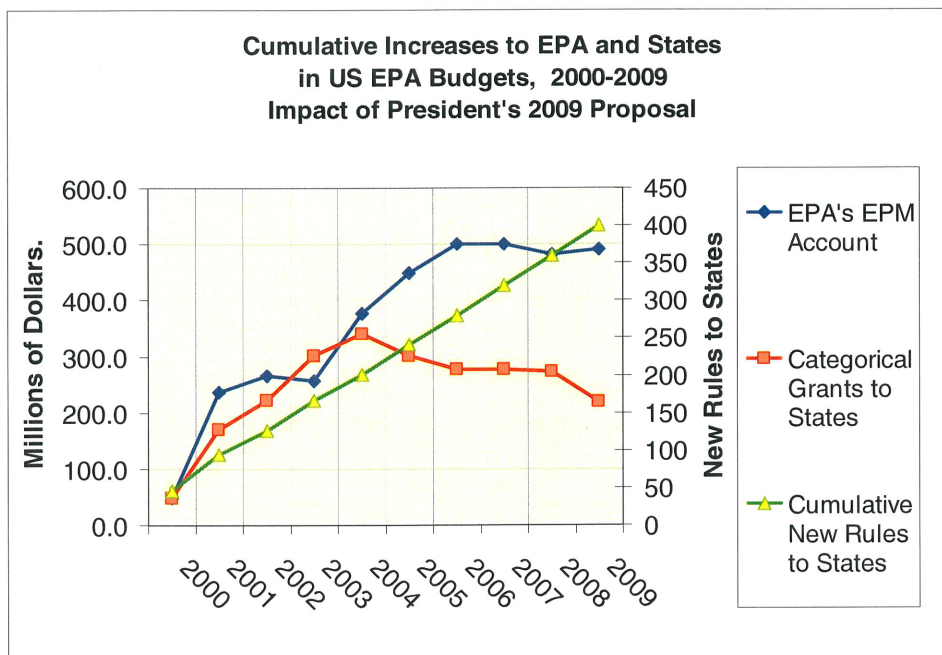
Enc.

cc: Governor Jim Gibbons  
Allen Biaggi, Director, DCNR  
Senator Harry Reid  
Senator John Ensign  
Representative Shelley Berkley  
Representative Jon Porter  
Representative Dean Heller

Table 1. Recent Budget History<sup>1</sup>

	Total EPA Budget (1)	STAG (2)	Non-STAG portion of EPA's budget	Non-STAG Increase	State increase	% of EPA's budget to states
	\$ billions	\$billions	\$billions	\$billions	\$billions	
FY 2009 Proposed	7.143	2.622	4.521	-0.014	-0.304	36.7%
FY 2008	7.461	2.926	4.535	0.023	-0.287	39.2%
FY 2007	7.725	3.213	4.512	0.015	0.072	41.6%
FY 2006	7.638	3.141	4.497	0.080	-0.442	41.1%
FY 2005	8.000	3.583	4.417	-0.048	-0.322	44.8%
FY 2004	8.370	3.905	4.465	0.069	0.221	46.7%
FY 2003	8.080	3.684	4.396	-0.341	0.331	45.6%
FY 2002	8.090	3.353	4.737	0.453	-0.195	41.4%
FY 2001	7.832	3.548	4.284	-0.087	0.356	45.3%
FY 2000	7.563	3.192	4.371	-0.475	0.447	42.2%
FY 1999	7.590	2.745	4.845	0.081	0.148	36.2%
FY 1998	7.361	2.597	4.764	0.684	-0.122	35.3%
FY 1997	6.799	2.719	4.080	0.130	0.146	40.0%

Figure 1. <sup>1</sup>



<sup>1</sup> ECOS "The States Environmental Agencies' Proposal to Congress for EPA's 2009 STAG Budget" February 2008.